SEP 10 2003

No. 03-20

IN THE

Supreme Court of the United States

FLORIDA MUNICIPAL POWER AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY MEMORANDUM

FREDERICK M. BRYANT
General Counsel for FLORIDA MUNICIPAL POWER AGENCY
Post Office Box 3209
Tallahassee, FL 32315-3209
(877) 297-2012

* Counsel of Record

ROBERT A. JABLON *
DANIEL I. DAVIDSON
PETER J. HOPKINS
SPIEGEL & MCDIARMID
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 879-4000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

ARGUMENT 1
CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499 (1935) 5

Statutes:

16 U.S.C. § 825l(a) 5

ARGUMENT

The Federal Energy Regulatory Commission's ("FERC") brief in opposition is a non-answer to Florida Municipal Power Agency's petition. FMPA demonstrated that the FERC's rehearing order was unequivocally and admittedly wrong on FERC's critical point that:

> FMPA has not demonstrated, *nor does FMPA even argue,* that its facilities meet the [integration] test [for determining whether customer facilities are entitled to credits].

Pet. at 3 (quoting Pet. App. B-6 (emphasis supplied)). In attempting to deal with the FERC's decision, the court of appeals stated:

> So what did FERC mean when it said that FMPA neither argued nor presented sufficient evidence of integration? *We have no idea.*

Pet. App. A-10 (emphasis supplied). The court of appeals ignored FERC's statement and found – contrary to FERC's plain pronouncement – that FERC had considered FMPA's rehearing arguments that FMPA's facilities satisfy the integration test.

FERC attempts to pass the case off as a run of mill administrative review case. FERC seeks to recast the issue as "Whether the court of appeals correctly determined that the Federal Energy Regulatory Commission adequately considered arguments petitioner made in an administrative proceeding." FERC Br. at I. FERC nowhere explains how the court of appeals could ignore FERC's clear, but erroneous, statement that FMPA presented no argument on rehearing concerning the integration test and how the court of

appeals could find to the contrary, based on other fragments of the order, that FERC did consider FMPA's arguments.

Not surprisingly, FERC fails to identify any law that permits a reviewing court to resolve, based upon guesswork, what is at the least a flat contradiction in FERC's order going to the fundamental basis of its decision. FERC argues that reviewing courts must uphold decisions of less than ideal clarity "'if the agency's path may reasonably be discerned.'" FERC Br. at 6 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Rather than responding to Petitioners' petition, FERC in its brief in opposition merely repeats the position of the court of appeals and concludes, "[T]he court of appeals had no difficulty discerning the agency's path in this case." *Id.* FERC's brief nowhere responds to FMPA's argument or attempts to demonstrate by what process, short of divination, the court could discern the FERC's position or disregard FERC's clear statement that it was unaware of any argument offered by FERC addressed to the integration of FMPA's facilities.

Disregarding FERC's clear statement that FMPA offered no argument, an extremely strained effort to make FERC's statements consistent might be that FERC was aware that FMPA argued that it should receive credits because its facilities are comparable to those of Florida Power, but that FERC was unaware that FMPA had argued that it met what FERC considered to be the different test for crediting integrated facilities.[1] Even this stretch would mean that the

---

[1] The Commission's description which immediately preceded its statement that no argument had been offered was:

> In its request for rehearing and its response to the Commission's April 2, 2001 order, FMPA reiterates its claims that it is entitled to credits for its facilities, because FMPA's facilities are comparable to those of Florida Power. FMPA argues that to the extent that

Commission was unaware of FMPA's actual rehearing argument (*see, e.g.*, Pet. App. H-12 to H-13, H-18 to H-28) and would therefore have required reversal.

However, FERC's statement that FMPA presented no argument is as plain as the English language permits. When the court of appeals stated that "it had no idea" what FERC meant when it made that statement, what the court of appeals must have meant is that it regarded FERC's statement as so irrational that it would not credit it as written and would

---

> the grid is defined to include FMPA's loads, both Florida Power and FMPA transmission are necessary to serve those loads.
>
> We disagree. In Order 888-A, the Commission elaborated on the criteria necessary to meet the system integration test. Specifically, the Commission stated the following:
>
> > [F]or a customer to be eligible for a credit, its facilities must not only be integrated with the transmission provider's system, but must also provide additional benefits to the transmission grid in terms of capability and reliability, and be relied upon for the coordinated operation of the grid. . . . the fact that a transmission customer's facilities may be interconnected with a transmission provider's system does not prove that the two systems comprise an integrated whole such that the transmission provider is able to provide transmission service to itself or other transmission customers over these facilities.

Pet . App. B-5 to B-6 (footnote omitted).

therefore ignore it. The court characterized its inability to solve the "enigma" of what FERC meant (actually, its refusal to credit FERC's straightforward statement) as not fatal, asserting that "under our deferential standard of review, we uphold agency decisions if supported by substantial evidence, 'not withstanding their expository shortcomings.'" Pet. App. A-10 (quoting *Pan-Alberta Gas, Ltd. v. FERC,* 251 F.3d 173, 176 (D.C. Cir. 2001)).

In its petition for certiorari (at 6) FMPA argued:

> The conflict between the proper function of a court reviewing an agency decision and what the court of appeals in fact did is most starkly illustrated by the following hypothetical. Assume at one point in its opinion the agency had stated, "We have reviewed the petitioner's arguments on rehearing concerning issue X and find them lacking for reasons stated in our prior order," and elsewhere it had stated, "We deny rehearing because petitioner has raised no arguments on rehearing concerning issue X." The reviewing court is not allowed to resolve this conflict (necessarily based on its own intuition or guess), but must remand to the agency. Even giving the court of appeals every benefit of the doubt, this was the situation before the D.C. Circuit. In resolving the conflict between the FERC's clear language that FMPA did not argue integration and the (marginal) possibility based on other language in the FERC's opinion that the FERC considered FMPA's arguments, the court finds that the FERC did consider FMPA's arguments. In doing so, it trespassed on the duty of the agency to

> render an intelligible, reasoned decision and substituted its own review for the (unknowable) view of the agency.

Other than mischaracterizing the matter at hand the government has no answer to the foregoing.[2] The court of appeals, the nation's premier administrative court, stepped far beyond the appropriate role of a reviewing court when it substituted its guess as to what the agency meant to state for the explicit statement of the agency. This subverts the basic principle of administrative law that decisions be made by agencies and not by reviewing courts. Further, agency decisions must be sufficiently articulated so that reviewing courts can discern their meaning.[3] FERC's rehearing order

---

[2] In another example of FERC's unwillingness to confront Petitioner's argument, FERC asserts in its opposition (at 6) that "Petitioner suggests (Pet. 10 n.4) that FERC 'would have ruled differently' if it truly did consider petitioner's evidence" and "In support of that argument, petitioner primarily relies (Pet. 10) on the oral statement of a FERC Commissioner (now FERC's Chairman) that he was 'not sure' why petitioner failed to submit evidence of integration with Florida Power that would have been persuasive." FERC, however, offers no response to that statement by its Chairman. In fact, what the Chairman stated in discussing the instant case, was that the integration standard is "a pretty easy standard," that it "looks like FMPA has such [integrated] facilities in the Florida region" and that he "is not sure why [a showing of additional benefits from FMPA's transmission] wasn't made in this case" Pet. App. F-1 and F-2. The obvious inference from that statement is that consistent with the statement contained in the Commission's Order, he was unaware that FMPA had presented argument and evidence addressed to the point.

[3] *See, e.g., United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935) ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong.").

may stand only if it is an intelligible reasoned decision.[4] It is not.

When the court of appeals admitted it did not know the meaning of FERC's statement that FMPA had presented no argument on the issue it was obligated to remand. This matter is far from inconsequential because the court of appeals could not know whether or to what extent FERC had actually considered FMPA's arguments and evidence. It is overwhelmingly plain and admitted that FMPA argued and presented evidence that it met FERC's integration standard. If its arguments were not considered, then FMPA never received its basic due process rights to have the decision-maker consider its arguments. And if the court of appeals may nonetheless affirm, while admitting that on this key point it did not know what the agency meant, this is the stuff of cocktail party derision, or worse, the confirmation of some of Shakespeare's and Dickens' more acerbic commentaries on the law.

The court of appeals supplies its own rationale rather than dealing with the Commission's stated position. In failing to remand so that the *Commission* could say what it meant or correct its error, the court of appeals ignores the most fundamental principle of administrative law. The court shifts administrative law to a standard under which agency decisions can be affirmed based on reasons given by reviewing courts and not by the agencies themselves, making reviewing courts the substantive decision-makers.

---

[4]Agency rehearing is a mandatory part of the review procedure under the Federal Power Act. 16 U.S.C. § 825l(a) (2000).

CONCLUSION

For the reasons stated above, and in the petition for certiorari, the writ should be granted and the decision of the court of appeals summarily reversed.

Respectfully submitted,

FREDERICK M. BRYANT
General Counsel for FLORIDA MUNICIPAL POWER AGENCY
Post Office Box 3209
Tallahassee, FL 32315-3209
(877) 297-2012

ROBERT A. JABLON
Counsel of Record
DANIEL I. DAVIDSON
PETER J. HOPKINS
Spiegel & McDiarmid
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 879-4000

September 10, 2003